U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 16 2015 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. We will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an elementary special education teacher for in Maryland. The petitioner has taught at the since December 2007. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a legal brief.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dep't of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The term "prospective" is included here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

I. Analysis

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, on August 22, 2013. An accompanying statement indicated that the petitioner's "petition for waiver of the labor certification is premised on her equivalent **Master's degree** and [her] over twenty **(20) years** of professional and progressive teaching experience" (emphasis in original). Academic degrees and experience can contribute toward a finding of exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii)(A) and (B),

respectively, but exceptional ability is not grounds for the waiver. *See* section 203(b)(2)(A) of the Act.

The introductory statement indicated that the submitted evidence shows that the petitioner "plays a crucial role in the future of the improvement of United States education and the attainment of our nation's goals." Many of the submitted exhibits are letters from administrators and teachers, as well as the parents of students. These individuals described the petitioner's contributions to the school where she teaches, but these contributions are inherently local.

Dr. principal of , stated:

> [The petitioner] has demonstrated outstanding practices in collecting and utilizing data for program accountability and designing successful differentiation for students. Often her data system models are utilized for professional development among colleagues. These data models serve as school-wide data collection models for the purpose of monitoring the student and school performance. This collection of data is also required for accountability by the Special Education Department for Compliance and regular student report cards.

Participation in required activities, such as data collection, is a fundamental job duty rather than a special contribution. Regarding the claim that the petitioner's "data system models are utilized for professional development among colleagues," the record does not show the extent of this use. Without evidence to that effect, the petitioner has not shown that the impact of her work extends beyond or even beyond the faculty of

The petitioner's remaining initial evidence consisted of certificates, evaluations, and other materials confirming that the petitioner is an experienced and qualified school teacher who taught in the Philippines prior to arriving at in 2007. These materials establish that the petitioner holds firm credentials as a special education teacher, but they do not show that the benefit from her employment will be national in scope or that her work has influenced the field.

The director issued a request for evidence (RFE) on November 26, 2013, stating that the petitioner's initial evidence does not "establish that the petitioner's work as an elementary special education teacher has had an impact on the field as a whole and that her teaching techniques [have] been used by other schools [beyond] her employer's organization."

In response, the petitioner submitted a statement indicating she meets the definition of a "highly qualified teacher" in the No Child Left Behind Act of 2001 (NCLBA), Pub. L. 107-110, 115 Stat. 1425 (Jan. 8, 2002). As "[e]vidence that the employment of a 'Highly Qualified Special Education Teacher' would benefit not only the improvement of education in the United States of America but also the nation's economy," the response statement cited a number of articles and opinion columns regarding the importance not of special education, but of science, technology, engineering and mathematics (STEM) education. The relevance of these materials is not readily evident, as the petitioner is not a specialized STEM teacher.

The response statement includes the following passage:

> The reasonable standard in determining whether the proposed employment is national in scope must not purely be geographical in nature but intellectual consideration as well such as directed to recapture the nation's economic dominance by future American populace. . . .
>
> Syllogistically, hiring 'Highly Qualified Teachers' would produce more graduates than dropouts. By producing graduates and eliminating dropouts, State and Federal Governments would be empowered by mature, intelligent and responsible citizenry.

The petitioner's RFE response statement detailed federal education initiatives and Maryland's statewide efforts to meet federal benchmarks, and indicated that the petitioner "plays a primary role in accomplishing the law's goal of closing the achievement gap" and "is an effective teacher in raising student achievement in STEM." The petitioner did not submit evidence to establish her role in "closing the achievement gap" or "raising student achievement in STEM," or to show that the hiring of one "Highly Qualified Teacher" increases graduation rates. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The RFE response statement offered generalized arguments regarding the importance of training workers in STEM fields and closing the "achievement gap" that exists along certain ethnic and economic lines. The evidence specific to the petitioner, however, did not indicate that her work has addressed or will address these issues. Letters from the petitioner's colleagues and the parents of her students focused, instead, on her effectiveness at teaching students, several of whom were described as having severe cognitive deficits.

The petitioner's RFE response statement discussed the NCLBA and various other federal education statutes and initiatives. These materials address the intrinsic merit of education, which the director had not disputed, and they describe national goals, but they do not state or imply that the work of one teacher significantly contributes to those goals. The importance of teachers is collective rather than individual. This conclusion is consistent with *NYSDOT*, which cited elementary school teachers as examples of an occupation with intrinsic merit but which lacked national scope. *Id.* at 217 n.3.

The RFE response statement claimed that "the No Child Left Behind Act of 2001 trumps the Labor Certificat[ion] since job opportunities for U.S. workers are guaranteed once No Child Left Behind Act of 2001 is faithfully executed." The petitioner did not identify any passage of the NCLBA that addresses immigration or could be interpreted to guarantee "job opportunities for U.S. workers." These unsupported assertions have no weight as evidence and do not meet the petitioner's burden of proof. *See Matter of Soffici*, 22 I&N Dec. at 165

The RFE response statement also claimed that the labor certification process would pose a "dilemma" because the petitioner's qualifications exceed the minimum requirements for the position, and "the

employer is required by No Child Left Behind (NCLB) Law . . . to employ highly qualified teachers." The petitioner did not show that these two considerations are incompatible. Section 9101(23) of the NCLBA defines the term "highly qualified teacher" as one who :

- has obtained full State certification as a teacher or passed the State teacher licensing examination, and holds a license to teach in such State;
- holds at least a bachelor's degree; and
- demonstrates competence in the academic subjects he or she teaches.

Section 9101(23)(A)(ii) of the NCLBA further indicates that a teacher is not "Highly Qualified" if he or she has "had certification or licensure requirements waived on an emergency, temporary, or provisional basis." The petitioner did not explain how the above requirements are incompatible with the existing labor certification process, and she submitted no evidence that the statutory job offer requirement has resulted in the widespread employment of teachers who are less than "highly qualified," or has impeded the employment of highly qualified teachers from abroad. The minimum degree requirement (*i.e.*, a bachelor's degree) is the same for labor certification as it is for a highly qualified teacher, and the petitioner did not show that the NCLBA distinguishes between teachers with bachelor's degrees and teachers with master's degrees.

In a personal statement, the petitioner acknowledged that sought foreign teachers because "they could not find U.S. workers," which appears to be the situation for which labor certification exists.

Dr. in a new letter, stated:

> [The petitioner] has demonstrated excellent leadership and expertise that contributed to the school's remarkable increase in proficiency as shown in Alt-MSA [Maryland School Assessment] testing results. achieved 90% advanced/proficient levels in all the subject areas tested, which included science, reading and math.

The record does not contain evidence to show that the petitioner, individually, played a significant role in the school-wide MSA scores. The petitioner submitted a copy of "Data From Progress Reports March 31, 2011," ranking her class's progress toward goals such as "Reading Goals" and "Independent Living." For each goal, there were three possible results: "Achieved," "Making Progress" and "Not Making Progress." The 2011 report shows every result scored under "Making Progress"; every number in the "Achieved" column is "0."

Dr. Cutright discussed other elements of the petitioner's work at

> As an Alt-MSA test administrator, [the petitioner] developed and implemented grade level testing artifacts aligned with the Maryland State Curriculum and Federal Regulations. . . .

> [The petitioner] will continue to work as a representative to for alternative assessments for our county. . . .
>
> Additionally, [the petitioner] has completed several successful teaching years as a special educator at our school. She has demonstrated outstanding practices in collecting and utilizing data for program accountability. Often her data system models are utilized for professional development among colleagues. These data models serve as school-wide data collection models for the purpose of monitoring the school's performance and student achievement. . . .
>
> [The petitioner's] accomplishments in have global implications in the field of special education. Firstly . . . reliable data collection systems are being sought. . . .
>
> In [the petitioner] participates in a county initiative charged with the task of developing a data collection system for students with disabilities. . . . As the data system is developed by this committee, it will serve students in and become a model for other systems, state wide and potentially nation wide as well.

The petitioner submits no evidence that, in the past, she has developed models that other school systems have put into use. Therefore, the assertion that a data collection system that is still under development could "potentially" "have global implications . . . [as] a model for other [school] systems" is unsupported speculation, which has no weight as evidence. *See Matter of Soffici*, 22 I&N Dec. at 165.

The director denied the petition on July 7, 2014. The director listed the evidence the petitioner submitted, quoted a selection of letters, and cited *NYSDOT* with respect to the local scope of classroom education. The director stated: "The issue is not the cumulative impact of thousands of teachers nationwide, but the impact of the [petitioner's] own activities."

On appeal, the petitioner submits a legal brief containing the assertion that USCIS has acknowledged "the absence of [a] clear-cut Congressional standard in understanding the concept of 'in the national interest,' and the mandate for 'flexibility.'" The brief contends that Congress resolved this "obscurity" and "preempted the USCIS" by passing the NCLBA "three years after NYSDOT was designated as a precedent decision," and that "the NCLB Act and the Obama Education Programs, taken collectively, provide the underlying context for the adjudication of a national interest waiver application made in conjunction with an E21 visa petition for employment as a Highly Qualified Teacher in the public education sector."

The references in the NCLBA to immigrants are to "immigrant students" and "immigrant children and youth." The brief cites no direct support for the claim that Congress intended for the NCLBA to affect the adjudication of national interest waiver applications. *See Matter of Soffici*, 22 I&N Dec. at 165.

Section 203(b)(2)(A) of the Act includes the phrase "national . . . educational interests . . . of the United States," but the assertion that the United States has "educational interests" does not create a blanket waiver for teachers. The same section of the law also subjects members of the professions (including teachers) to the job offer requirement. Statutory interpretation begins with the language of the statute itself. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990). Statutory language must be given conclusive weight unless the legislature expresses an intention to the contrary. *Int'l Brotherhood of Electrical Workers, Local Union No. 474, AFL-CIO v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987). Here, the petitioner has not established that Congress intended to exempt teachers from the job offer requirement, either through section 203(b)(2)(A) of the Act, the NCLBA, or any other federal legislation. Congress's only direct statement on the matter has been to apply, not waive, the requirement.

The appellate brief discusses "the national priority of closing the achievement gaps between minority and nonminority students, and between disadvantaged and more advantaged children," but provides no evidence that the petitioner has narrowed those gaps on a nationally significant level.

Regarding the petitioner's individual qualifications, the brief states:

> USCIS-Texas Service Center has not specified what it meant by 'any contributions of unusual significance that would warrant a national interest waiver.' There is no clarity on this particular requirement and yet, the Director has easily dismissed the incomparable accomplishments of [the petitioner] as submitted in her Case File. By requiring the petitioner to submit evidence of ambiguous nature is 'unduly burdensome' and in effect tantamount to requiring 'impossible evidence' for being extremely subjective. . . .
>
> [A]pparently, the Immigration Service is requiring . . . extraordinary ability which is over-reaching.

The petitioner does not explain how the director has required evidence of extraordinary ability. The evidentiary requirements to establish extraordinary ability, at 8 C.F.R. § 204.5(h)(3), are neither identical nor similar to the guidelines in *NYSDOT*. The phrase "any contributions of unusual significance that would warrant a national interest waiver," although presented in the brief in quotation marks, does not appear in the denial notice. The denial does contain a similar passage: "At issue is whether this beneficiary's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver." The director provided a concrete example of a qualifying circumstance: "formulat[ing] new educational policies or strategies or techniques that have been widely implemented outside her school district."

The record does not support the claim, on appeal, that the petitioner "has submitted overwhelming evidence in the initial submission." The initial submission consisted almost entirely of documentation of the petitioner's work at the local level, such as classroom evaluations, professional development certificates, and letters from [redacted] teachers and administrators which do not constitute

"overwhelming evidence" of eligibility. Instead, the brief revisits the contention that the passage of the NCLBA, and the existence of other federal education initiatives, have implied the existence of a blanket waiver for teachers without making express provisions for such a waiver or repealing the statute that holds teachers to the job offer requirement. These claims lack legal and factual support, and do not establish that the petitioner, by virtue of being an experienced special education teacher, qualifies for a national interest waiver of the statutory job offer requirement.

II. Conclusion

The petitioner has not established a past record of achievement at a level that would justify a waiver of the job offer requirement. The petitioner need not demonstrate notoriety on the scale of national acclaim, but the national interest waiver contemplates that her influence be national in scope. *NYSDOT*, 22 I&N Dec. at 217, n.3. More specifically, the petitioner "must clearly present a significant benefit to the field of endeavor." *Id.* at 218. *See also id.* at 219, n.6 (the alien must have "a past history of demonstrable achievement with some degree of influence on the field as a whole").

As is clear from the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

We will dismiss the appeal for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.